

Bai (Migration) [2023] AATA 1911 (20 June 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Xiaohong Bai
REPRESENTATIVE:	Mrs Madalina Eisenstat (MARN: 1804962)
CASE NUMBER:	2111433
HOME AFFAIRS REFERENCE(S):	BCC2019/3234323
MEMBER:	Edward Howard
DATE:	20 June 2023
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2) of Schedule 2 to the Regulations • cl 820.221(1) of Schedule 2 to the Regulations • reg 2.03A

Statement made on 20 June 2023 at 12:07pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – financial, household and social aspects of relationship and nature of commitment – registered civil partnership and recognition by family and friends – extensive documentary evidence provided – application made more than 28 days after last substantive visa held – compelling reasons for not applying criterion – length of relationship – sponsor’s physical and mental health and applicant’s care – decision made without hearing necessary – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5CB(2), 65
Migration Regulations 1994 (Cth), rr 1.09A(3), 2.03A(5), Schedule 2, cls 820.211(2)(d)(ii), 820.221(1)*

CASES

Ally v MIAC [2008] FCAFC 49

Bab Ricci v MIMIA (2005) 141 FCR 285

He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

MZYPZ v MIAC [2012] FCA 478

Plaintiff M64/2015 v MIBP [2015] HCA 50

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 27 June 2019 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211.
4. The Tribunal has considered all of the evidence, which includes extensive documentary evidence provided to the Tribunal and is satisfied that a decision can be made without the need for a hearing.
5. The applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Issues And Law

7. There is a two-stage process for onshore Partner visas. A visa applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. In this matter, the Tribunal is considering the first, temporary stage.
8. Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the reg 1.09A(3) matters may relate to circumstances after the time of application. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the sponsor were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.¹ The Tribunal observes this to be a matter where the visa applicant submitted limited documentary evidence in support of his visa application to the Department of Home Affairs and then furnished the Tribunal with further evidence that was unavailable to the primary decision maker.
9. The issue in the present case is whether at the time of the visa application and the time of this decision, the visa applicant is the spouse or de facto partner of the sponsor.

¹ *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it ‘tends to logically show the existence or non-existence of’ the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15].

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

11. Are the parties in a de facto relationship?

12. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
13. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3) which is attached to this decision. Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
14. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years old: reg 2.03A(2). In this case, at the time of application, the visa applicant and the sponsor were at least 18 years old.
15. The visa applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: reg 2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
16. The parties provided a Civil Partnership Certificate registered on 21 December 2018. Therefore, the applicant has provided evidence that the relationship is registered under the Civil Partnerships Act 2011 (Qld) as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: reg 2.03A(5). Accordingly, the 12-month requirement does not apply.
17. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in reg 2.03A and that the parties were in a de facto relationship that was valid for the purposes of the Act as required by s 5CB(2) at the time of the application for a visa.

18. Are the other requirements for a de facto relationship met?

- *Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.*
19. The evidence of the parties is that their household income includes the retirement income of the sponsor and the income received by the visa applicant in her part-time work. The parties

have a joint bank account and each contributes to the normal day-to-day household expenses. The evidence of the parties is that they pool their resources for their regular expenses.

20. The sponsor owns his own property, however the parties jointly contribute to the utilities and other expenses associated with the property. The parties have resided together as a de facto couple continuously since May 2018 at the unit in Southport.
21. Whilst the parties do not own a major asset together, they do have joint liabilities in relation to the expenses associated with the property and miscellaneous expenses. The Tribunal is satisfied that the parties each contribute to the financial aspects of the relationship to the extent that they are able, pool their financial resources and share the day-to-day household expenses. The Tribunal weighs the financial aspects of the relationship in favour of the visa applicant.
 - *Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*
22. The evidence of the parties is that they commenced living together in May 2018 and registered their civil partnership on 21 December 2018.
23. The parties have provided extensive evidence as to their household as a couple over an extended period of time. The Tribunal places weight on the parties' living arrangements, based on the evidence that they lived together from May 2018 until the present time and have lived in the same apartment during this time.
24. Whilst the parties do not have any joint responsibility for the care and support children, they are regularly and actively involved in the lives of the sponsor's adult children and the sponsor's grandchildren.
25. The Tribunal is satisfied that the parties' household and living arrangements are consistent with that of a de facto couple in a genuine relationship. Based upon the evidence received, the Tribunal weighs the household aspects in favour of the visa applicant.
 - *Social aspects of the relationship – including whether parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*
26. The parties have provided extensive evidence supporting their claim of being in a genuine relationship. The evidence demonstrates the clear recognition by family, friends and acquaintances, recognising the parties as a genuine couple over a period of more than 5 years.
27. The parties have provided extensive evidence in support of the social aspects of their relationship. This evidence supports the claim that they represent themselves to other people as being in a committed de facto relationship. The evidence of the parties is that they socialise with family and friends on a regular basis.
28. In particular, the evidence of the sponsors adult children is very persuasive. They each talk affectionately and positively about the visa applicant and her close relationship with their father. They also attest to the strong relationship that each of them and their children have with the visa applicant.

29. The Tribunal is satisfied on the evidence that the parties represent themselves to other people as being in a long-term relationship and that they hold the favourable opinion of family, friends and acquaintances about the nature of their relationship and that they regularly plan and undertake joint social activities. The Tribunal weighs the social aspects of the relationship in favour of visa applicant.
- *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*
30. The parties claim to have met in April 2018. The parties claim that they moved in together in May 2018. The parties registered their relationship pursuant to the Civil Partnerships Act 2011 (Qld) on 21 December 2018. Since that time, the parties have continued to live as a de facto couple at their residence in Southport.
31. The Tribunal has received extensive evidence in relation to the various medical conditions of the sponsor. In early 2019, after suffering symptoms of dizziness, blackouts and anxiety, the sponsor was referred to a cardiologist. On 22 March 2019, he underwent surgery for the insertion of a pacemaker at the Gold Coast University Hospital. Unfortunately, there were ongoing complications and difficulties with the pacemaker which led to serious and debilitating symptoms for sponsor.
32. In 2021, the sponsor underwent revision heart surgery on at least two occasions at The Prince Charles Hospital, Brisbane. According to the report of his cardiologist, Dr Robert Park, the pacemaker condition appears to be stable. Dr Park noted that the sponsor's condition is a significant cardiomyopathy with worsened functional class. The sponsor has undergone complex cardiac surgeries at two hospitals on three different occasions. He has also been suffering from mental health issues including panic attacks and stress. Dr Park was of the opinion that the assistance of his partner, the visa applicant, was assisting him in coping with his condition.
33. The evidence of the sponsor and his adult children is clearly that the sponsor relies upon the physical presence and assistance of the visa applicant in many aspects of life as a result of his heart condition and ongoing symptoms relating to panic attacks, anxiety and stress. The statutory declarations provided by his three adult children refer extensively to the serious and debilitating health issues that their father has suffered and continues to show signs of, as a result of his ongoing condition.
34. The evidence of the sponsor's children confirms the sponsor's own evidence that the visa applicant has been a crucial and vitally important part of his recovery, recuperation and ongoing ability to live with his health conditions.
35. Additionally, each of the sponsor's children relate their fond affection for the visa applicant, whom they have all grown to know and love over an extended period of time. They have also referred to the important connection that the visa applicant has with the sponsor's grandchildren on an ongoing basis.
36. Unfortunately, the sponsor's adult children are unable to assist with the care of their father on a regular basis. The sponsor's daughter is a single mother who lives in Brisbane and works full-time. The sponsor's two sons do not live in Queensland and have children and families of their own and also work full-time. One of his sons has a disabled child who requires extra assistance and care. In the circumstances, the visa applicant's daily care and support of the sponsor is even more necessary.

37. From the evidence provided, the Tribunal accepts that the parties have supported and cared for each other through difficult times, especially relating to the serious and ongoing heart condition suffered by the sponsor. The evidence supports a finding that the parties are in a genuine and continuing relationship, showing strong commitment to each other and clearly see the relationship as long-term. In particular, the Tribunal finds that the parties have now been in a relationship for more than five years. The Tribunal weighs the nature of the commitment in favour of the visa applicant.
38. Having carefully considered the evidence and for the reasons above, the Tribunal is satisfied that at the time of application, the parties had a mutual commitment to a shared life to the exclusion of all others; that the relationship between them was genuine and continuing; and that they had lived together since May 2018. The Tribunal is therefore satisfied the requirements of section 5CB of the act were met the time of the visa application.
39. The Tribunal is further satisfied that at the time of this decision the parties continue to have a mutual commitment to a shared life to the exclusion of all others and that the relationship between them has been and remains genuine and continuing. The Tribunal is also satisfied that they have lived together or not live separately and apart on a permanent basis. The Tribunal is therefore satisfied the requirements of section 5CB(2)(a)-(d) of the Act are met at the time of this decision.
40. The Tribunal is therefore satisfied that the parties relationship fulfilled the criteria contained in clause 820.211(2)(a) of the regulations at the time the visa application was made and at the time of this decision.

41. *Does the applicant meet Schedule 3 criteria, or are there compelling reasons for not applying those criteria?*

42. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. The applicant must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl 820.211(2)(d).

43. *Criterion 3001*

44. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as the day the applicant last held a substantive visa. It is not in dispute that the applicant in the present case did not make the application for a partner visa within 28 days after the relevant day.
45. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether there are compelling reasons for not applying the criterion.

46. *Compelling reasons*

47. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
48. The expression 'compelling reasons' is not defined for these purposes. However, reasons that are compelling should 'force or drive the decision-maker' 'irresistibly' to some end: *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [31]. The reasons or circumstances should be sufficiently powerful to lead a decision-maker to find that the criteria should not be

applied: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.

49. In considering the issue of '*compelling reasons*', the Tribunal has had regard to the *Migration Regulations (Amendment) 1996 NO. 75* and in particular to the *Explanatory Statement*. Clause 10 of Schedule 2 gives examples of circumstances in which a waiver may be justified. Clause 10.1 states that the reasons must be of a "*strongly compassionate nature*" and refers to such reasons as including those '*where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer*'.
50. In the present case, the parties are already in a long-standing relationship which has been in existence for two years or longer, namely for a period of more than five years.
51. As noted above, the Tribunal has found that at the time of application and the time of this decision, the parties have been in a committed, exclusive relationship for a period in excess of five years. The Tribunal considers that the evidence of this long-standing, genuine relationship between the parties', constitutes a *compelling reason* to waive the Schedule 3 criteria.
52. Further, the Tribunal also accepts the evidence of the visa applicant and the sponsor, relating to the significant emotional, psychological and physical dependence of the sponsor on the visa applicant. The Tribunal considers this evidence to constitute further *compelling reasons* to waive the Schedule 3 criteria. In particular, the Tribunal refers to the following evidence:
 - (i) the sponsor suffers from a serious and at times, critical, heart condition;
 - (ii) in March 2019, the sponsor underwent surgery for the insertion of a pacemaker at the Gold Coast University Hospital. Unfortunately, there were ongoing complications and difficulties with the pacemaker which led to various debilitating symptoms;
 - (iii) in 2021, the sponsor underwent revision heart surgery on two occasions at The Prince Charles Hospital, Brisbane, in an attempt to stabilise his deteriorating heart condition;
 - (iv) the report of his cardiologist, Dr Robert Park, states that the pacemaker condition appears to be stable. Dr Park noted that the sponsor's condition is a significant cardiomyopathy with worsened functional class;
 - (v) Dr Park notes that the sponsor has undergone complex cardiac surgeries at two hospitals on three different occasions. He has also been suffering from mental health issues including panic attacks and stress. Dr Park was of the opinion that the assistance of his partner, the visa applicant, was assisting him in his gradual return to health;
 - (vi) the evidence of the sponsor and his adult children is that the sponsor relies upon the emotional, psychological and physical assistance of the visa applicant in many aspects of life as a result of his heart condition and ongoing symptoms relating to panic attacks, anxiety and stress;

- (vii) the statutory declarations provided by his three adult children refer extensively to the serious and debilitating health issues that their father has suffered and continues to suffer, as a result of his ongoing condition;
- (viii) the evidence of the sponsor's children confirms the sponsor's own evidence that the visa applicant has been a crucial and vitally important part of the sponsor's recovery, recuperation and ongoing ability to deal with his health conditions;
- (ix) the sponsor's adult children are unable to assist their father on a regular basis. The sponsor's daughter is a single mother who lives in Brisbane and works full-time. The sponsor's two sons do not live in Queensland and have children and families of their own and also work full-time. One of his sons has a disabled child who requires extra assistance and care;
- (x) the Tribunal accepts the evidence of the parties that the visa applicant has been the vital and primary factor in helping the sponsor through her ongoing emotional, psychological and physical support for the sponsor, providing him with the ability to cope with the ongoing stress anxiety and physical limitations relating to the heart condition; and
- (xi) the Tribunal finds that in the event of the visa applicant having to leave Australia and be separated from the sponsor, it is highly likely that the sponsor would suffer serious and debilitating psychological injury and ongoing emotional stress, which would have a serious negative impact having regard to his heart condition. It is further likely that the sponsor would, as a consequence, require medical intervention in relation to mental health issues.

53. ***Conclusion on whether there are compelling reasons***

54. Having carefully considered all of the evidence, the Tribunal is satisfied that there are *compelling reasons* for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).

55. **Overall Conclusions**

56. Having considered the evidence and as noted above, the Tribunal is satisfied that at the time of application and at the time of this decision, the parties have a mutual commitment to a shared life to the exclusion of all others; that the relationship between them is genuine and continuing; and that they live together and not separately and apart on a permanent basis. The Tribunal is therefore satisfied the requirements of section 5CB of the Act were met the time of the visa application and at the time of this decision.
57. The Tribunal is therefore satisfied that the parties relationship fulfilled the criteria contained in clause 820.211(2)(a) of the regulations at the time the visa application was made and at the time of this decision.
58. The Tribunal is satisfied that at the time of the application, the visa applicant was sponsored by her de facto partner in accordance with cl.820.211(c). The Tribunal is satisfied that at the time of this decision the visa applicant continues to be sponsored by her partner.
59. Pursuant to clause 820.221(1), in order to be eligible for the grant of a subclass 820 (UK) visa, the visa applicant must also continue to meet the requirements of clause 820.211(2) at the time of this decision. Having regard to the evidence before the Tribunal, the Tribunal is

satisfied that the visa applicant continues to meet the requirements of clause 820.211(2), hence satisfying the criteria in clause 820.221(1).

60. Therefore, the Tribunal finds that the visa applicant meets the requirements of clauses 820.211(2) and 820.221(1).
61. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

62. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2) of Schedule 2 to the Regulations
 - cl 820.221(1) of Schedule 2 to the Regulations
 - reg 2.03A

63.

Edward Howard
Member

64.

65.

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).